

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

In the Matter of:

S & S ENTERPRISES, LLC d/b/a
APPALACHIAN HEATING,
Respondent,

And

SHEET METAL, AIR, RAIL, AND
TRANSPORTATION WORKERS
LOCAL UNION NO. 33

Charging Party.

Case Nos: 09-CA-235304
09-CA-235307
09-CA-235314
09-CA-236905
09-CA-237847
09-CA-237851
09-CA-237858
09-CA-238621
09-CA-238930
09-CA-239148
09-CA-239170
09-CA-241292
09-CA-242230
09-CA-242235
09-CA-242238

**SHEET METAL, AIR, RAIL, AND TRANSPORTATION WORKERS LOCAL UNION
NO. 33'S POST HEARING BRIEF TO THE ADMINISTRATIVE LAW JUDGE**

Respectfully submitted,

WIDMAN & FRANKLIN, LLC

/s/Kera L. Paoff

Kera L. Paoff (0082674)
405 Madison Avenue, Suite 1550
Toledo, Ohio 43604
(419) 243-9005 – Telephone
(419) 243-9404 – Fax
kera@wflawfirm.com

Attorney for Charging Party

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I. INTRODUCTION

Charging Party, Sheet Metal, Air, Rail and Transportation Workers, Local Union No. 33 (“Union” or “SMART 33”) joins in the brief filed by the Counsel for the General Counsel demonstrating Respondent S & S Enterprises, LLC d/b/a Appalachian Heating (“Respondent”) engaged in numerous violations of the Act. SMART 33 writes separately only to highlight the reprehensible conduct by Respondent in connection with a few of the discrimination charges, address the false allegations raised by Respondent, and advocate for a broad remedy.

As demonstrated throughout the hearing in this case, Respondent sent a clear message to its employees – it will not tolerate any union activity and if you support the Union, you will not only find yourself isolated and ultimately without a job but will also be met with threats of criminal or civil prosecution based on false accusations by Respondent. The violations described herein, in connection with the multiple additional violations as outlined by Counsel for the General Counsel, show Respondent is a repeat offender who has a blatant disregard for employees’ rights. Its conduct goes against the heart of what the Act is meant to protect and it cannot be allowed to stand or go unredressed or under-redressed. Accordingly, SMART 33 urges any decision and order contain a broad notice remedy in addition to making the discriminatees whole.

II. LAW AND ARGUMENT¹

A. Applicable Law.

An employer violates Sections 8(a)(1) and (3) of the Act when there is a showing, by a preponderance of the evidence, that an employee’s protected conduct was a motivating factor in

¹ For the sake of efficiency, SMART 33 will not rehash all of the background and relevant factual information as Counsel for the General Counsel will have completely done so in its post hearing brief. Rather, SMART 33 will refer to various facts as it applies to the law in its argument.

the employer's adverse action. It has long been settled that the burden shifting analysis contained in the Board's decision in *Wright Line*, 251 NLRB 1083 (1980) applies in determining whether an employee was discriminated/retaliated against for engaging in protected conduct. The initial showing is met by demonstrating: 1) the employee engaged in union or other protected activity; 2) the employer was aware of said activity; and 3) union animus on the part of the employer. *Kitsap Tenant Support Services, Inc.*, 366 NLRB No. 98, *14 (May 31, 2018). Once these elements are met, the burden of persuasion shifts to the employer to prove by a preponderance of evidence that it would have taken the same adverse action even in the absence of the union or other protected conduct. *Id.*

Knowledge is inferred when an employee engaged in overt union activities or based on proximate evidence of contemporaneous violations, the timing of the adverse action, and the pretextual nature of the employer's proffered reason. *Bliss Clearing Niagra, Inc.*, 344 NLRB No. 26 (2005). In addition, knowledge may also be established if an employer suspects, but is uncertain, that an employee engaged in union activities. *Trader Horn of N.J.*, 316 NLRB 194 (1995) (citing *Respond First Aid*, 299 NLRB 167 (1990)).

Unlawful motivation may be established by circumstantial evidence, such as 1) timing between the union activity and adverse action as well as timing between the alleged misconduct and the adverse action; 2) presence of other ULPs; 3) statements and actions demonstrating generalized union animus; 4) disparate treatment; 5) departure from past practice; 6) the pretextual nature of the proffered reason; and 7) shifting justifications for the adverse action. *See Advanced Masonry Associates, LLC*, 366 NLRB No. 57 (2018); *In re Enjo Contracting Co., Inc.*, 340 NLRB No 162, fn. 2 (2003).

B. Respondent Failed to Promote Eric Faubel Because of His Union Activities and Sympathies in Violation of the Act.

In one of its first of many actions to thwart the rights of employees protected by the Act, Respondent refused to promote SMART 33 organizer and salt, Eric Faubel (“Eric”). After the foreman of the Crossings job left, Respondent was looking to “promote from within” and looked to their first choice – Eric. (Tr. 142-43, GC Ex. 8). Despite conveying an intention to promote Eric with an immediate raise from \$18.00 to \$22.00 per hour and a second raise to \$25.00 per hour at the end of the week (January 18, 2019), Respondent refused to grant him that promotion and instead banished him to an isolated job site, with only one other employee who tolerated working at Respondent without the benefits of a union for 20 years. (Tr. 56-57, 210-11, 193). As explained more fully below, this came within days of 1) Respondent learning that Eric worked for a union contractor in the recent past; 2) increased union activity by way of YouTube videos published by SMART 33; 3) unlawful interrogation of Eric; 4) increased suspicions that Eric was a union supporter and/or providing SMART 33 with information about Respondent; and 5) a background check which uncovered that Eric had previously attempted to organize Grogg’s Heating & Air Conditioning, a nonunion company. (Tr. 47, 52-53, 77-78, 81-82, 141-51, 191-93, 269).

The undisputed evidence in this case demonstrates that Respondent had knowledge of Eric’s union activity to meet the *Wright Line* standard. By the time the decision is made, both Dan Akers (“Dan”) and Daniel Akers (“Daniel”) were highly suspicious about Eric’s participation in union activities and his union membership. They questioned Eric at least twice about this. One of these occasions occurred during the phone call with Daniel on January 9, 2019 discussing the possibility of promoting Eric. (Tr. 135, 141-51, GC Ex. 8). During that call Daniel says, “I’m fully aware of all of this crap going on with the union guys coming into our shop...And that union guy

solicited every single employee of ours...” and he goes on to show his disdain for SMART 33 and their organizing efforts. (Tr. 143-45, GC Ex. 8). Daniel then offers that if Eric is interested in the position, he and Dan would come up with a package to discuss. (Tr. 144, GC Ex. 8). Immediately after this offer, Daniel asks Eric if he was “solicited by the union guy?”. (Tr. 145, GC Ex. 8). In connection with that question and referenced at other points in the conversation, Daniel tells Eric that he does not like hearsay, seeming to suggest he may have heard things about Eric either talking to a union representative or being one.

Another inquiry into Eric’s affiliation was after Dan had talked to Eric’s former boss, John McDougal. Dan told Eric that there was “one thing that concerned me a little bit”, and that was when he looked McDougal up online, he saw that it was a union shop. (Tr. 191, GC Ex. 11). Dan went on to say that “I’m just curious now *because of* these letters and things that’s been posted on some of our vehicles, are you a member of the union here?”. (Tr. 192, GC Ex. 11) (emphasis added). When Eric denies being a union member, Dan does not appear to believe him – “Well, then I don’t know where all this union stuff’s coming from”. (*Id.*).

In addition to overtly asking Eric about his union activity, they did a background check on him which confirmed their suspicions that Eric was a union member. (Tr. 52-53). Given Dan’s response to Eric’s denial of being a union member, it is reasonable to believe that he also did a google search of Eric as he did on McDougal. In fact, it would be incredible to believe that he did not do one given the level of inquiry into Eric’s background at this point, particularly if we are to believe Dan that McDougal did not immediately respond to his reference check. A simple google search of Eric will bring up his union affiliation. Accordingly, through all the inquiries, suspicions and timing, there is more than sufficient evidence to infer knowledge on Respondent’s part.

Respondent may attempt to claim that it did not know that Eric was a union supporter until the January 30th video came out. However, Dan's testimony on this point is not as clear as Respondent would have this tribunal believe. In fact, he was not confident in any dates he testified about. In addition, SMART 33 submits that Dan's testimony lacks credibility. By way of example, Dan claims that Respondent did not have Eric's original application which listed his references. (Tr. 54). Dan then meets with Eric on January 14, 2019 and Eric provides Dan with the name and phone number of his reference. (Tr. 179-80, 186, GC Ex. 10(a), 10(b) at p. 12). Dan claims that he had to make numerous phone calls to this reference and that he "eventually" spoke with him. (Tr. 46). Yet, within hours of Eric providing the reference to Dan on January 14, 2019, Dan had already spoke to him and called Eric about the conversation. (Tr. 179-180, 190-95, GC EX. 11). Certainly, one would not make numerous phone calls in the same day without waiting for a response to the message. Either Dan is not being truthful about having Eric's original application and had made attempts prior to January 14, 2019 to reach his reference, or he is not being truthful about the extended time waiting for the reference check. Either way, Dan's testimony is not trustworthy.

The evidence also demonstrates that the adverse decisions here were based on Eric's union activity. It is clear based on the recordings introduced at hearing that Dan and Daniel were upset about the union activity at this point. In addition to the comments by Dan and Daniel referenced above, the testimony showed they both had great contempt for SMART 33. They did not like what the Union was doing; and, in fact, Daniel responded to the flyer distributed by the Union on January 10, 2019 by threatening, "I need to go by here and talk to his ass" in the midst of his tirade about the Union. (GC Ex. 9(a), 9(b) at p. 27-28).

The timing of Dan's actions is also suspect. The day after Dan interrogated Eric about his union status in discussing the promotion, on January 15, 2019, SMART 33 published a YouTube

video in connection with its organizing campaign. (Tr. 81-82). Respondent was upset by the video and even contacted YouTube to get it removed, which Respondent believes was taken down on the 16th. (*Id.*). On January 17, 2019, SMART 33 published another video on YouTube. (*Id.*). The very next day, inexplicably, Jonathan Tierson (“Tierson”) was given the foreman position and Eric was banished to a much smaller job. (Tr. 56-57, 210-11). The fact that Respondent took that action against Eric in such close temporal proximity to union activity evidences Respondent’s animus.

Noticeably, Dan, who made the adverse decisions, never testified as to the reason for his decisions, nor did he testify as to the conduct that occurred during the January 18, 2019 meeting. However, if it were appropriate to consider Respondent’s counsel’s opening statement as to the reason why, it is pretext. Respondent claims that it took the adverse actions against Eric because of conduct that allegedly occurred during a meeting with him on January 18, 2019. However, there has been no credible evidence submitted demonstrating that Eric was belligerent, threatening or even disrespectful in any way. To the contrary, Eric testified, and the recording demonstrates, that Eric was at first understandably upset about being presented with an unwarranted discipline, but he was not engaging in any irate or explosive behavior. (Tr. 199-202; Charging Party Ex. 1(a) and (b)). After questioning the write up, the meeting proceeded where Dan and Eric figured out the problem and the write up was thrown out. (*Id.*). At no time was Eric ever disciplined for any alleged inappropriate conduct during the meeting.

Respondent relies heavily on an apology by Eric after he was banished – an apology that was made in response to initially being argumentative about the write up rather than just taking it and signing it. (Tr. 205-06). All that Respondent has done is grasp on to this respectful apology to concoct this outrageous story that Eric was uncontrollable and outrageous.

SMART 33 would be remiss in not pointing out that Tim McGuffin's testimony, like Dan's, is not credible. He claims that Dan told Eric to leave the job trailer and Eric, "flailing" around, "stormed out of the door". (Tr. 651). McGuffin also claims that Dan left for the day after Eric left the meeting and that Eric continued to be irate and unprofessional. (*Id.*). But as the recording demonstrates, none of these things happened. The three of them – Eric, McGuffin and Dan – calmly discussed the issue with the time clock app, were cordial at the end of the meeting in the job trailer and all left together to do a walk through. It is Dan who says at the end, "Let's go walk up on the floors and see what's going on". (Charging Party Ex. 1(a) and (b)). This is contrary to McGuffin's version who says Dan was not even there for the walk through. (Tr. 651). Put simply, his testimony, particularly concerning these events, is untrustworthy.

There is no question that Respondent's proffered reason is pretext. When viewed with the other compelling evidence of animus, it is clear Respondent rescinded the promotion opportunity and banished Eric to the vet clinic based on his union activity.

Because the decisionmaker himself did not explain his reasons, Respondent has not put forth any evidence that these actions would have been taken against Eric absent his union activity, let alone overcome its burden of proving such.

C. Stephen Marolf's Discipline was the Result of His Union Activities and Sympathies in Violation of the Act.

Stephen Marolf ("Stephen") signed a union authorization card and participated in the first ULP strike that went from February 27, 2019 through March 12, 2019. (Tr. 327, 334-37; Jt. Exs. 4, 6). It cannot be disputed that Stephen engaged in union activity and Respondent knew about it. Both disciplines issued to Stephen, on their face, note that he was disciplined for engaging in union activity. On March 15, 2019, Stephen was on a break, talking about the Union with his coworkers

when Roger Hight (“Hight”) came into the room. (Tr. 346-49). Stephen offered Hight a sticker for his hard hat and Hight overreacted and went ballistic. (*Id.*, Jt. Ex. 8). He came after Stephen and said “I’m going to rip your fucking head off”. (Tr. 347, Jt. Ex. 8). After this incident, Stephen was called to Daniel’s office in Beckley where he was given discipline for spreading union paraphernalia. (Tr. 349-50, Jt. Ex. 7). He was then banished from the Crossings job for a couple of weeks. (Tr. 357-58, 360, 366).

Around March 19, 2019, Stephen was working out of town. (Tr. 359). Union organizer Steve Hancock (“Hancock”) arrived at the job site to continue his organizing efforts. (*Id.*, Tr. 475). Respondent believed that Stephen was discussing his working conditions with Hancock, including the current job site where he was banished as part of his prior discipline. (Tr. 363). Respondent issued Stephen a second written warning for communicating with the Union. (Jt. Ex. 10). Likely because Stephen was working out of town overnight, the warning, while apparently written on March 19, 2019, was not given to Stephen for signature until March 27, 2019. (*Id.*). When it was presented, Daniel threatened him with termination – “we [are] going to play baseball and three strikes, you’re out”. (Tr. 364). Daniel did not even ask Stephen for his side of the story or whether he actually did tell Hancock any information about the jobsite.² (Tr. 363).

The totality of the circumstances shows that Respondent issued the disciplines because of Stephen’s support for the Union. The temporal proximity of the first discipline calls its legitimacy into doubt. It occurred just two days after Stephen returned from a ULP strike and within days of Respondent’s threats that it would seek civil and criminal penalties against the picketers or others

² Whether Stephen did talk to Hancock about the jobsite or not is not dispositive of this issue as Daniel believed that Stephen was engaging in union activity by doing so and disciplined him for it. *Trader Horn of N.J.*, 316 NLRB 194 (1995) (citing *Respond First Aid*, 299 NLRB 167 (1990)).

engaging in union activity. (GC Exs. 5, 12). The second discipline was written up just four days after that – and one day after other employees began the second ULP strike.

Additionally, Stephen was treated differently than other employees in similar situations. Taking the second discipline first, it appears Respondent wants to make this issue about confidentiality. First, there is no issue of confidentiality – it was a public job site, not a private residence. (*See* Tr. 358). Second, there has never been a proscription of discussing job sites with anyone. More importantly, even if there was some violation, other employees have shared information about jobs and jobsites and Respondent stipulated that there was no other discipline for confidentiality violations. (Tr. 72-73, 365).

With respect to the incident on March 15, 2019, as explained below, Hight, who was the one who actually threatened physical violence against Stephen, received no discipline. There is no explanation as to why Stephen was treated differently, except that he is a union supporter and engaged in union activity.

In fact, Respondent virtually ignored these allegations. It put on scant testimony that Hight was disciplined for his involvement, but it did not introduce any discipline during the hearing. The discipline Respondent attached to one of its position statements shows that it was not directed at Hight, but rather only addressed Stephen's behavior, not the fact that Hight threatened physical violence. (GC Ex. 26, p. 28). This document was also not signed until March 19, 2019, thereby undermining Respondent's contention that Hight was removed from the jobsite for any period of time. (*Id.*). Moreover, Stephen was banished to work out of town overnight then to work in Respondent's Bradley shop (which he had never done before). (Tr. 357-58, 360). Hight on the other hand remained where he was and received no adverse effects of any alleged "discipline". (Tr. 542).

All of these factors, when coupled with the overall union animus described herein and in the Counsel for General Counsel's brief, demonstrate that Stephen was disciplined because of his union involvement. By contrast, Respondent has not put forth any evidence that Stephen would have been disciplined but for his union activity.

D. Respondent Terminated Brandon Armstrong Because of His Union Activities and Sympathies in Violation of the Act.

In the case of SMART 33's other salt, Brandon Armstrong ("Brandon"), there is no question that 1) he engaged in union and protected activity; 2) Respondent knew about it; and 3) Respondent held union animus. On February 4, 2019, Daniel believed that Brandon was recording the captive audience meeting, presumptively understanding that he was providing information to the Union. (Tr. 92-93). Following this, Daniel investigated Brandon's background and uncovered a Facebook post Brandon made years ago about the Union, confirming Daniel's belief that Brandon was a union member. (Tr. 431-37, GC Ex. 25). On February 21, 2019, Brandon wore a Union t-shirt. (Tr. 437). Respondent admits that on March 1, 2019, Brandon was not sent the text about the picketers because they knew he was a union supporter. (Tr. 92-93). Respondent cannot deny that it knew of Brandon's union and protected activity.

By March 27, 2019 when Respondent terminated Brandon, its hatred for the Union had not fizzled. It held an anti-union captive audience meeting. (Tr. 105-06, 325, 428-29, GC. Ex. 24). Respondent had disciplined and isolated union supporters. (Tr. 223-24, 332, 341-42, 345-46, 399, 404-05, 438, 441, Jt. Exs. 7, 10). It had threatened picketers and union supporters. (Tr. 332, Jt. Exs. 5, 12). It surveilled the picketers and not just gave other employees the indication that union activities would be surveilled, but actually encouraged all employees to surveil any union

supporter. (Jt. Ex. 5, GC Ex. 14). The morning of Brandon's termination, Respondent was informed that another union supporter would be returning from strike. (Jt. Ex. 11).

Respondent did not see that the union supporters were getting the message that union activity was not going to be tolerated, so on March 27, 2019, it terminated Brandon's employment. (Tr. 444). The continued anti-union sentiments and the timing of his termination is more than enough to demonstrate that Brandon was terminated because of his union activity. However, evidence relating to several other factors showing a discriminating motive are present here.

In his termination meeting and as written on the notice, Brandon is told he is being "laid off due to a lack of work". (Jt. Ex. 12). Respondent also tells Brandon that it has nothing to do with him and that he would get a good reference. (Tr. 116, 595). In its position statement to the Region, Respondent elaborates about the "no expectation that it will recall" Brandon by stating it is "because the current work projections do not indicate that any work will be available in the foreseeable future". (GC. Ex. 26, p. 4). This is simply not true. There was an abundance of testimony at the hearing that the Crossings job was undermanned, behind and that employees were being told to work longer hours and more days. (Tr. 136, 369-73, 406-07, 580). Tierson told employees that the general contractor, Jarrett Construction, wanted Respondent to hire more men to get the job moving. (*See id.*). There was also testimony about outside forces creating more work for Respondent, *i.e.*, a tornado. (Tr. 581-82). Daniel testified that Respondent actually received more jobs shortly after Brandon's termination. (Tr. 621-22). In fact, since Brandon's termination, Respondent hired 5 more HVAC employees. (GC. Ex. 4). Dan testified that "absolutely" if there is more work, an employee who is laid off has an opportunity to return. (Tr. 63). Yet, Brandon has never been provided that opportunity. Respondent's feigned claim of lack of work simply is not credible and is just a pretext to cover up its animus.

Respondent's ad nauseum reference to "last in/first out" likewise lacks sincerity. Interestingly enough, during the February 4, 2019 captive audience meeting, Respondent boasted that it had never laid anyone off in the 70 years that it has been in business. (Tr. 106, 428-29). Even if work was slow, Respondent found something for employees to do rather than lay them off. (Tr. 428-29). Respondent's claim that it follows the last in/first out theory is questionable at best.

Regardless, the evidence does not support Respondent's claim that that is what happened here. Brandon was hired November 19, 2018. According to Respondent's records, Kevin Keith was hired December 17, 2018 in the same position as Brandon. (Jt. Ex. 14). While Respondent may attempt to muddy the water by claiming that there was a difference between Keith and Brandon because of the locations of their "Reporting Office", that is just a fallacy. Keith worked at the Crossings, just like Brandon. (Tr. 338). In fact, Brandon was teaching Keith things because he was new to HVAC work. (Tr. 447). There was also testimony that employees were interchangeable between the locations. (Tr. 77).

Moreover, Respondent has provided shifting rationales for terminating Brandon's employment, further substantiating that it had to do with union animus, not any legitimate reason. At the hearing, Respondent introduced evidence that Brandon was a poor worker. (*See, e.g.*, Tr. 109). Testimony during the hearing demonstrated that this lacks believability as there were no warnings, discussions or other evidence to back up Respondent's bald assertions. However, there is no reason to address that here as the fact that Respondent is attempting to shift justifications for terminating Brandon without any expectation of recall is sufficient to establish that Respondent held an unlawful motive. According to Board law, where an employer, like Respondent, has shifted defenses for an adverse action, none of its proffered reasons are the real reason; rather, the discharge was because of an unlawful motive. *Approved Electric Corp*, 356 NLRB 238 (2010)

(finding an unlawful motive where the termination notices indicated the reason was a lay off and the employer claimed other nondiscriminatory reasons during the hearing); *Jacee Elec., Inc.*, 355 NLRB No. 46 (2001) (“Respondent’s varying rationales for its conduct lead to the inference that the real reason for the layoff is not among those asserted by the Respondent”).

If that were not enough, however, there is more evidence of Respondent’s clear animosity. McGuffin testified that his intent in offering Brandon a reference at the time of his termination was because he wanted to spread Respondent’s newly created false allegations of poor work performance to future employers which would thereby interfere with any ability to gain employment elsewhere. (Tr. 657).

Any one of these factors support a finding that Brandon was terminated because of his union activity in violation of the Act. When viewed in totality, there is no question that Respondent’s motive was unlawful.

E. Respondent Terminated Eric Faubel and Threatened Him Because of His Union Activities and Sympathies in Violation of the Act.

To ensure that its employees knew that supporting the union would be particularly detrimental to their lives, financially and perhaps otherwise, Respondent took another shot at Eric at the end of May 2019. Immediately upon Eric’s return from his second ULP strike on May 28, 2019, Dan met with Eric at the Crossings, handed him a letter, informed him that his employment was terminated, and said “we’ll see you in court”. (Tr. 240-41). The letter threatened civil and criminal prosecution, alleging Eric was “responsible for improper installation of numerous fire dampers at the Crossings.” (Jt. Ex. 15). Respondent claims that Eric installed fire dampers upside-down and they needed to be redone by flipping them over. Eric disputes ever installing fire dampers incorrectly at the Crossings or engaging in any misconduct. (Tr. 241-42). Respondent’s

interested witnesses proved not to be credible. However, leaving the credibility issue aside for the sake of argument, there is ample evidence to demonstrate that Respondent was motivated by animus; rather than its proffered reason.

On December 19, 2019, Eric informed Respondent that it had the wrong type of dampers. (Tr. 236). Respondent's response was to just install them anyway and cover them with foil tape, but Eric did not do that. (Tr. 243). According to McGuffin who does the ordering for Respondent, it took 8-10 days to get the correct fire dampers, at which time they began being installed. (Tr. 641). That brings us to the New Year. On January 8 and 9, 2019, Eric is not performing any HVAC work for at least 4 hours each day as he was in the job meeting. (Tr. 130-31, 134). By January 18, 2019, Eric is gone from the Crossings job. That leaves very little time for Eric to install all of the fire dampers Respondent now wants to blame on him.

Not only that, however, even if Respondent's incredible story were true, it knew long before terminating Eric that there were improperly installed fire dampers at the Crossings. McGuffin and Tierson could not agree exactly when the upside-down fire dampers were discovered, but it was before Eric even went on his first ULP strike. McGuffin indicated that it could have been as early as 8-10 days after the installation of the correct ones began, or late January, 2019. (Tr. 642). Tierson indicated that it was sometime after he became foreman (January 18, 2019) but before he received his fire damper license (February 28, 2019). (Tr. 608-09). He knows this as he did not flip the fire dampers over because he did not have his license at the time. (*Id.*).

Yet, Respondent did not terminate Eric then. Eric returns from the first ULP strike on March 15, 2019. At that time, Dan and Daniel give Eric his 90-day review. (Tr. 95-96, 99, 233-35). The review was overall positive, with the one negative remark being about his attendance

because Respondent used the days that he was participating in the ULP strike as a negative factor in his attendance. (*Id.*). During this review, nothing was discussed about Eric improperly installing fire dampers or other poor performance. (Tr. 235). Rather, Dan acknowledged that Eric helped the company out by identifying that the wrong type of fire dampers had originally been ordered. (*Id.*). Given that Respondent “knew” that Eric put in fire dampers upside down, that begs the question why not terminate Eric then, give him a poor review, or at a minimum discuss it with him. There are two possibilities – either the fire dampers were not installed improperly, or Eric did not do it.

The timing of Eric’s termination also supports a finding of unlawful motivation on Respondent’s part. Respondent did not let Eric return from his ULP strike; rather, it fired him on the spot. More importantly, on May 13, 2019, the Regional Director issued the First Consolidated Complaint in this Action, with Respondent filing its Answer the day before Eric is terminated. (GC Exs. 1(w) and (dd)).

Likewise, the disparate treatment between Eric and other employees who installed fire dampers upside down shows unlawful motive. Respondent admits that fire dampers were installed upside down on the 2nd floor and further admits that it was not Eric who installed those. (Tr. 586). Neither of the two employees who worked on that floor installing dampers were disciplined in any way, let alone terminated and threatened with civil and criminal prosecution. (Tr. 601, 608).

Additionally telling is the fact that at no point in time did anyone talk to Eric about the alleged improper installation of fire dampers. (Tr. 659-60). A lack of investigation into the situation demonstrates that Respondent was motivated by animus, not any actual performance issue. Finally, Dan’s threat of “see you in court” and the letter’s threat of civil and criminal prosecution could not make Respondent’s animus any clearer. In sum, there is no doubt that Respondent terminated Eric in retaliation for his union activity.

Even if Eric improperly installed fire dampers, which he did not, Respondent has not met its burden of establishing that he would have been terminated absent his union activity.

F. A Broad Remedy is Called for in This Case.

While the focus of this post-hearing brief has been on the egregious conduct above, this is not meant to underplay the seriousness of Respondent's other actions. The testimony and evidence in this case as outlined by the Counsel for General Counsel demonstrates Respondent's absolute abhorrence for rights of employees guaranteed by Section 7 of the Act. But it is not just the multitude of violations that warrant a broad remedy in this case, but Respondent's own words. As explained by Respondent's representative in his opening presentation, Respondent considers the normal remedy for isolated Section 8(a)(1) violations as "just putting a notice on the wall for 60 days". (Tr. 31). Respondent's attitude, the sheer number of violations, as well as the fact that posting a notice would not actually reach all of its employees warrants a different remedy here.

Where an employer's conduct is "sufficiently serious and widespread", a public notice reading has been found to be necessary "in order to dissipate as much as possible any lingering effects of the [employer's] unfair labor practices." *Evenflow v. Transportation, Inc.*, 361 NLRB No. 160 (2014); *Carey Salt Co.*, 360 NLRB No. 38 (2014); *Blockbuster Pavilion*, 331 NLRB 1274 (2000); *Audubon Regional Medical Center*, 331 NLRB 374 (2000).

Respondent's flagrant disregard for employees' rights and widespread campaign to suppress the exercise of such rights has resulted in countless violations of the Act. Even after the first Consolidated Complaint was issued against it for various violations, Respondent did not cease its overt crusade to show employees what happens to union supporters – you lose your job and are met with threats and false allegations. Respondent's flippant attitude toward the posting will not even attempt to redress the damage that has been done by Respondent's coercive conduct.

A public notice reading has a far better chance of at least starting to redress the effects of Respondent's numerous and constant violations than a notice posting alone. SMART 33 also requests that the Notice be sent via mail to current and former employees.

Additionally, SMART 33 advocates for the full range of remedies available to make the discriminatees whole including the full array of economic remedies, including interest, as well as any other remedies deemed just and proper.

III. CONCLUSION

Respondent's reprehensible conduct throughout SMART 33's organizing campaign left employees with the clear impression that if you support the Union, there is no place for you in Respondent's employ. The discriminatees discussed herein were used by Respondent in the forefront as examples of the unlawful lengths Respondent would go to in an attempt to suppress its employees' rights to organize. The actions against these discriminatees alone are extreme violations of the Act warranting a broad remedy. When viewed in light of the numerous other violations described in the hearing and in the post hearing brief of the General Counsel, there is no question that Respondent's conduct was so severe and widespread that it warrants a public reading.

For the foregoing reasons, and the reasons contained in the post hearing brief of the General Counsel, SMART 33 respectfully requests the ALJ find that Respondent violated the Act as set forth in the Consolidated Complaint, order a public reading and provide for appropriate remedies to the discriminatees and any other remedy deemed just and proper.

Respectfully submitted,

WIDMAN & FRANKLIN, LLC

/s/Kera L. Paoff

Kera L. Paoff (0082674)
405 Madison Avenue, Suite 1550
Toledo, Ohio 43604
(419) 243-9005 – Telephone
(419) 243-9404 – Fax
kera@wflawfirm.com

Attorney for Charging Party

CERTIFICATE OF SERVICE

This is to certify that the foregoing was filed electronically with the Division of Judges of the NLRB and was sent via email to the following on October 24, 2019:

Jamie Ireland, Esq.
jamie.ireland@nlrb.gov
Jonathan Duffey, Esq.
jonathan.duffey@nlrb.gov
General Counsel

Nathan Sweet, Esq.
nsweet@nradvocates.com
Jim Allen
jallen@nradvocates.com
Counsel for Respondent

/s/Kera L. Paoff

Kera L. Paoff (0082674)